

ANIMAL PROTECTION INSTITUTE OF AMERICA ET AL.

IBLA 92-39

Decided mARCH 5, 1992

Appeal from a decision of the Area Manager, Cody, Wyoming, Resource Area, Bureau of Land Management, establishing the appropriate management level of wild horses in the McCullough Peaks Herd Management Area and allowing for the removal of horses in excess of that level. WYO14-EAO-058.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

The Board will affirm a decision establishing the appropriate management level suitable for a herd management area where the decision is predicated on an analysis of monitoring data such as grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that maintenance of the herd at the prescribed levels of horse population will restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988). When an appellant merely urges some other course of action which may be theoretically as correct as that chosen by BLM, this Board will not substitute its judgment for that of the Department's experts, but will rely on their reasoned analysis. In cases involving the interpretation of data, the appellant must demonstrate by the preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting the data, or in reaching the conclusion.

APPEARANCES: Nancy Whitaker, Assistant Director of Public Land Issues, Animal Protection Institute of America, Sacramento, California; Russell J. Gaspar, Esq., Washington, D.C., for the American Horse Protection Association, Inc., and The Humane Society of the United States; Kermit C. Brown, Esq., Rawlins, Wyoming, for the Wyoming State Grazing Board; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Animal Protection Institute of America (APIA), the American Horse Protection Association (AHPA), and The Humane Society of the United States (HSUS) have appealed the August 20, 1991, decision of the Area Manager, Cody, Wyoming, Resource Area, Bureau of Land Management (BLM), to establish "the Appropriate Management Level [AML] of wild horses in the McCullough Peaks Herd [Management] Area at an average of 100 horses with population thresholds of 70 minimum and 140 maximum." <sup>1/</sup> Implementation of the decision necessitates the removal of excess horses from the McCullough Peaks Herd Management Area (HMA).

BLM has requested that we place the decision in full force and effect immediately in accordance with 43 CFR 4.21(a), arguing that any delay in removal will result in unnecessary damage to surface resources and undue hardships on the horses. BLM avers that "[t]he current population of 362 horses [1991 census] is more than double the Resource Management Plan AML maximum of 140 and more than six times the average that current monitoring indicates can be sustained" (Respondent's Answer to Appellants' Statement of Reasons at 11). Challenging the interpretation of BLM's range monitoring data, appellants contend that severe stress levels on the range resources leading to imminent catastrophic results is not the case and horse removal plans may be properly suspended pending the outcome of the appeal without serious harm to the herd. Our review of the facts of the case in response to BLM's request has led us to issue an expedited decision in the matter.

Section 3(b)(2) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b)(2) (1988), provides the statutory authority for the removal of excess wild free-roaming horses and burros from the public range. Specifically, the statute provides that, where the Secretary of the Interior determines on the basis of information available to him

that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken \* \* \* until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation.

16 U.S.C. § 1333(b)(2) (1988). "[E]xcess animals" are defined in the Act as wild free-roaming horses or burros "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area." 16 U.S.C. § 1332(f) (1988).

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<sup>1/</sup> The Wyoming State Grazing Board (WSGB) also appealed from the decision, but withdrew its appeal on Nov. 25, 1991. Subsequently, the WSGB petitioned for permission to intervene. That petition is granted.

A determination that removal of wild horses is warranted must be based on research and analysis, and on monitoring programs involving studies of grazing utilization, trend in range condition, actual use, and climatic factors. Animal Protection Institute of America, 117 IBLA 4, 5 (1990); Animal Protection Institute of America, 109 IBLA 112, 120 (1989).

The AML in question and the proposed horse removal action are the result of a recent evaluation of the McCullough Peaks HMA. A proposed decision on the AML for the HMA was presented to the public in March 1991 which anticipated a removal of approximately 184 horses from the August 1990 census of 244. This proposed action was based on range monitoring data obtained within the HMA during the years 1987 through 1989. In a protest filed in April 1991, APIA specifically challenged BLM's method of establishing the number of horses which the HMA will support. APIA alleged that it was incorrect to establish "arbitrary 'AMLs' in land use plans rather than basing them on the ongoing monitoring and inventorying that is the management model required by NEPA (Protest at 4)." Arguing that the data exists for "a multiple use decision," APIA asserted that BLM has improperly emphasized preference and not focused on actual utilization (Protest at 5-6). BLM addressed those concerns in a response to the protest dated August 20, 1991, which accompanied the Decision Record.

In Decision Record EA No. WY014-EAO-058, the Range Conservationist and Area Manager, Cody Resource Area, BLM, reviewed four alternatives and chose "Alternative 1, Original AML," based on the following rationale:

One purpose of the current monitoring effort was to analyze whether or not the existing AML established in the 1985 HMAP was appropriate to maintain the number of horses over time (sustained yield) while establishing a thriving ecological balance. The herd parameters under Alternative 1 (70 - 140) are very close to those suggested by the monitoring data (60 - 100). This higher level (70 - 140) will accommodate the return of 10 year and older horses. The existing McCullough Peaks HMA Plan, verified by the preceding evaluation and update, has been well considered with regard to attaining a thriving ecological balance and to prevent range deterioration within the HMA. The AML of wild horses has been correctly established (70 - 140) and is supported by current monitoring data.

(Decision Record at 2). The basis for this decision was provided by an Evaluation and Update of the McCullough Peaks Wild Horse Herd Area Management Plan/Capture Plan and Environmental Assessment No. WY014-EAO-058. The purpose of that document was explained:

In June of 1985, the Cody Resource Area Manager signed the Record of Decision (ROD) for the McCollough Peaks Herd Area Management Plan (HMAP). Subsequent to this document, the Cody Resource Area Resource Management Plan/ Grazing Environmental Impact Statement (RMP/EIS), (Draft, 1988 and Final, 1989) were issued. All of these documents call for the Herd Management Area (HMA) to support a minimum of 70 head and a maximum of 122

140 total head of wild horses (840 - 1680 AUMs). The underlying assumption of this range in herd numbers was that roundups would be conducted, as necessary, to maintain an average of 100 wild horses in the HMA (1200 AUMs). This would be accomplished by gathering horses when herd population levels reached or surpassed 140 head, removing enough horses to leave 70 head, for an overall average of 100 horses. This method was considered to be more cost efficient than annual roundups. This strategy was also expected to result in less capture[-]induced stress on the horses by only conducting roundups approximately every third year.

The purpose of this evaluation and update is two-fold. The first is to assess the monitoring data collected in the HMA since the original plan was approved. And second, to utilize this monitoring data to determine the APPROPRIATE MANAGEMENT LEVEL (AML) of wild horses to achieve a THRIVING NATURAL ECOLOGICAL BALANCE in the HMA relative to the levels prescribed in the 1985 HMAP and the requirements of section 3(b)(2) of the Wild and Free Roaming Horse and Burro Act of 1971 [sic] and [16] U.S.C. 1333(b)(2) (1982) to prevent deterioration of the range resource. [Emphasis in original.]

EA No. WY014-EAO-058 at 1. Based on this evaluation, the Area Manager issued the AML and attendant decision to remove from which appellants have appealed.

In its statement of reasons, APIA contends that BLM failed to make a multiple-use decision "related to the allocation of forage based on monitoring the user-impact of the grazing species" (APIA Statement of Reasons (SOR) at 1). Instead, BLM's decision "manage[s] wild horses/burros by numbers rather than their impact on the range." Id. APIA argues BLM must allocate available range resources among wild horses, wildlife, and livestock, and that BLM has misconstrued "grazing preference" under the Taylor Grazing Act to mean a preference for allocating the resources to livestock. "It is not how many, but their impact on the range, by which [wild horses] are to be managed," APIA argues. Id. at 7.

In their joint SOR, AHPA and HSUS do not challenge the need to remove some of the horses but contend that BLM's decision "has actually adopted the Environmental Assessment's 'proposed action' in the guise of reaffirming the 1985 HMAP decision" (AHPA/HSUS SOR at 4). They argue that the population numbers prescribed in the 1985 HMAP were for adult horses only, not all horses (i.e., including foals). Appellants also question the accuracy of the 1990 census of the horse population and therefore the need to remove as many horses as prescribed. Finally, appellants question whether the HMAP was properly determined where BLM refused to reduce the active livestock preference and did not demonstrate that livestock grazing was not excessive.

BLM responds that appellants did not demonstrate BLM's decision was not a multiple-use decision or that it is inconsistent with the RMP. BLM acknowledges that it was an oversight that the AML was not defined in terms of "adult horses," but argues that appellants have not demonstrated that the population counts, or census, are incorrect for any given year of monitoring.

BLM's "Evaluation and Update of the McCullough Peaks Wild Horse Herd Area Management Plan/Capture Plan and Environmental Assessment No. WYO-14-EAO-058" thoroughly analyzes the monitoring data collected by BLM. Several factors were addressed: precipitation, livestock actual and preferential use, wild horse actual use, forage utilization, and range condition and trends. Monitoring of the range during the subject years revealed lower than normal precipitation. BLM has established the desired use levels of the available forage as 40 to 50 percent and concluded that, under current conditions, 7,465 AUM's are available for grazing. Of those 7,546 AUM's, 6,761 AUM's are assigned to active livestock grazing preference accounts. Thus, only 704 AUM's are available to the wild horse population under the desired allocation. Under BLM's equation for the desired stocking rate, those 704 AUM's equate to herd parameters of 60 to 100 horses. See Evaluation Document at 11, 13-14, and Appendix B.

BLM's monitoring efforts also identified that through voluntary nonuse of the livestock grazing allocation, an average of 3,712 AUM's are not being used at present. Of the current herd population of 342, about 280 horses have been identified as adults. Such a group would consume approximately 3,360 AUM's, which, as appellants note, is well under the level of authorized grazing use not presently utilized. Appellants and BLM differ as to the management objectives resulting from this data.

BLM's November 1990 Resource Management Plan (RMP) for the Cody Resource Area establishes two objectives relevant to this case. The management objective for a livestock grazing management decision provides: "The livestock grazing management objective is to improve forage production and ecological range condition for the benefit of livestock use, wildlife, and watershed resources (RMP at 19)," while the stated objective for wild horse management decisions reads: "The wild horse management objective in the McCullough Peaks WHHMA is to maintain a viable herd that will maintain the free-roaming nature of wild horses in a thriving ecological balance and to provide opportunity for the public to view wild horses (RMP at 38)." Based on its objectives, BLM determined that the "current amounts, kinds, and seasons of livestock grazing use will continue to be authorized until monitoring indicates a grazing use adjustment is necessary (RMP at 19)." BLM's August 20, 1991, decision established the AML at a level in accordance with the RMP. This Board will customarily affirm a BLM decision implementing a resource management plan when it is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal. Animal Protection Institute of America, 117 IBLA 208, 216 (1990), and cases cited. BLM's decision was

issued to conform with the RMP for the Cody Resource Area. While the RMP itself is not an appealable decision, its implementation is. See id. at 218 n.4.

[1] Appellants oppose BLM's decision as too strongly favoring livestock. In particular, appellants request that we review BLM's favorable allocation, or "preferential treatment," for livestock use. Although we will not substitute our judgment for that of BLM's experts and managers regarding the allocation of grazing reductions among livestock and wild horses, the Wild Free-Roaming Horses and Burros Act requires a finding that the horses to be removed are excess, *i.e.*, that they threaten range deterioration and impairment of multiple-use relationships resulting from overpopulation. In this case, the record establishes that the integrity of the range and its forage capability are threatened by an overpopulation of horses. Appellants allege error, arguing that current "actual use" will not jeopardize range stability in light of the recognized nonuse of a portion of the livestock allocation. In circumstances such as those presented here, we are unwilling to overturn a BLM decision if the appellant merely presents some other course of action which may be theoretically as correct as that chosen by BLM. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the interpretation of data demonstrates that another course of action or interpretation is available or that the party's proposed course of action is also supported by the evidence. The appellant must demonstrate by a preponderance of the evidence that the BLM expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion. Animal Protection Institute of America, 118 IBLA 63, 76 (1991). Appellants have failed to demonstrate that BLM erred in establishing the AML. Indeed, they agree with BLM that some horses must be removed; they disagree on how many. If events prove that BLM removed more horses than was absolutely necessary, its action will simply postpone the need for a subsequent round-up. On the other hand, if events proved appellants' suggested higher AML was incorrect, the damage to the range and the horses would have already occurred and BLM would be forced to severely reduce the size of the herd to permit range recovery. Under such circumstances we have affirmed BLM's decision to remove excess animals. Animal Protection Institute of America, 118 IBLA at 74-76.

As the court stated in Dahl v. Clark, 600 F. Supp. 585, 594 (D. Nev. 1984), "the benchmark test" for determining the suitable number of wild horses on the public range is "thriving ecological balance." The goal of wild horse and burro management should be to maintain a thriving ecological balance between wild horse and burro populations, wildlife, livestock, and vegetation, and to protect the range from the deterioration associated with overpopulation of wild horses and burros. See Animal Protection Institute of America, 118 IBLA 20, 23 (1991). With respect to the decision to remove horses and maintain the horse population in the McCullough Peaks HMA at the ascertained appropriate level, we find these statutory objectives are accomplished by the BLM actions appealed here.

Appellants argue BLM has failed to determine the optimum level of wild horses on the basis of adequate monitoring, seeking in part to draw support from our decisions in prior appeals in which we set aside proposed gathers because we found that BLM had not properly established appropriate management levels for wild horses in the affected HMA's. We find this case to be distinguishable from those prior cases where horse gather decisions based on horse population numbers existing at the time land use plans were generated were set aside and remanded. See Craig C. Downer, 111 IBLA 332 (1989); Animal Protection Institute of America, 109 IBLA 112 (1989). Those decisions were set aside because the decisions adopted the planning document numbers as appropriate management levels, rather than as a starting point for monitoring purposes, and the record failed to support a finding that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological balance and protect the range from deterioration associated with overpopulation. Animal Protection Institute of America, 118 IBLA at 26-27. However, the record before us reflects substantial monitoring of usage of the public lands by wild horses and livestock and of the condition of the range in terms of forage utilization. While appellants disagree with the application of the data derived from monitoring the several factors involved, particularly the formula employed, we find nothing in their arguments to demonstrate that BLM's approach, while different than theirs, is in error. See id. at 26. As noted, such disagreements are insufficient to render BLM's findings invalid.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge